BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom ("TWTC"), by its attorneys, hereby files these comments in response to the Fourth Further Notice of Proposed Rulemaking ("Notice")[1] as modified by the Supplemental Order[2] in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

For about 15 years now, competitive carriers have been building facilities to compete with the ILECs in the provision of access services. This competitive entry was made possible by the Commission's decisions mandating ILEC expanded interconnection via collocation pursuant to the pre-1996 Act provisions of the Communications Act. An important aspect of those policy decisions was the reliance on facilities-based competitive entry, rather than prescriptive rate reductions, to drive ILEC access

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1 See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Fourth Further Notice of Proposed Rulemaking* (rel. Nov. 5, 1999) ("Notice").

2 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order* (rel. Nov. 24, 1999) ("Supplemental Order").

charges down. That policy has been very successful. Competitive carriers have built a tremendous amount of fiber, over 30,000 miles nationwide covering most of the commercial districts in the country. Customers served by these competitive networks receive the benefits of lower prices, innovation, and improved reliability that only facilities-based competition can deliver.

In passing the 1996 Act, Congress's primary goal was to remove the legal and economic barriers to entry in the part of the telecommunications business left untouched by the Commission's pre-1996 Act decisions: local exchange service. In addition, the Commission sought to establish the preconditions for the introduction of new advanced services. In implementing the Act, the Commission has established prices for unbundled network elements ("UNE") and reciprocal compensation based on forward-looking cost to force the ILECs to share their economies of scale and scope with competitors in the local and advanced services markets. But as the Commission recognized in the recent UNE Remand Order, low prices for UNEs are primarily designed to encourage facilities-based competition. They are not designed to create opportunities for pure arbitrage, especially access charge arbitrage.

Indeed, in every situation in which the application of the 1996 Act pricing rules has threatened to cause a flash-cut reduction in access charges, the Commission has been careful to avoid this result. For example, the Commission held that TELRIC-based reciprocal compensation rates should not to apply to access traffic. Similarly, the Commission held that unbundled loops and

switches are available to an IXC so long as the IXC also provides any local service the customers want delivered over the lines and switches in question. In the meantime, the Commission has continued on its separate track for access charge reform by making the ILECs' rate structure more efficient, reducing regulation and, this past summer, establishing a framework for ILEC pricing flexibility.

In the Notice, the Commission has now sought comment on whether it can and should continue its policy of treating access and local services differently. There is no question that this policy should be continued and applied in full force to special access, dedicated and shared transport. As the Commission has found, relying on market forces for lowering access rates results in more efficient outcomes than regulatory prescription. Requiring ILECs to make available loops and transport for the provision of access as discussed in the Notice would effectively reverse the Commission's long-standing policy against prescriptive rate reductions for access charges.

It is also clear that the Commission has the authority to place long-term restrictions on loops and transport to prevent the use of these facilities for primarily access purposes. The Commission and the Eighth Circuit have found that Section 251(g) gives the Commission the authority to prevent the pricing provisions of the 1996 Act from applying to access charges. There is no reason why that provision could not also apply to UNEs.

While the Commission has expressed some concern that its construction of Section 251(c)(3) as permitting a requesting carrier to provide any service it chooses using a UNE would preclude UNE use restrictions, this is not the case. In fact, the Commission has not allowed requesting carriers to use UNEs to provide services that would result in pure access arbitrage. For example, as mentioned, the Commission has prohibited a requesting carrier that does not provide the local service associated with a particular line and switch from providing long distance over those facilities. This decision was not dictated by the physical nature of loops and switches (customers usually purchase local and long distance from different carriers), but was instead (at least in part) a policy decision to restrict the use of UNEs as a means of access charge arbitrage. The same policy can be applied pursuant to Section 251(g) to prevent arbitrage here.

In addition, Section 251(c)(3) provides the Commission with the authority to allow ILECs to place "just and reasonable" "conditions" on the use of UNEs. Nothing in the statute, Commission rules, or case law prevents the Commission from relying on this provision to establish UNE use restrictions. Finally, Section 251(d)(2) also provides the Commission with the authority to establish use restrictions for UNEs. That provision allows the Commission to consider factors other than the "impair" standard in determining the extent of an ILEC's unbundling obligations, and the preservation of the access charge regime is surely a legitimate factor to consider. Moreover, even the "impair" standard itself calls for the Commission to inquire as

to whether a carrier is impaired in the provision of a particular service using the UNE in question.

The Commission should therefore exercise its authority to establish restrictions on the use of loops and transport for predominantly traditional long distance services. At the same time, the Commission should be sure that these UNEs continue to be available for the provision of local service, access service associated with local service, and advanced services.

II. REQUESTING CARRIERS SHOULD NOT BE PERMITTED TO USE UNES TO PROVIDE PREDOMINANTLY ACCESS-RELATED SERVICES

In the UNE Remand Order[3] the Commission concluded that unbundled transport should not be available, on an interim basis, in the "discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence." See UNE Remand Order at ¶ 489. In particular, the Commission stated that it was concerned that making such entrance facilities available as UNEs would result in "arbitrage" opportunities for IXCs that "could cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform." Id. In the Supplemental Order, the Commission later extended the restriction to allow ILECs to refuse to allow requesting carriers to use all loop and transport combinations "as a substitute for special

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[3] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order* (rel. Nov. 5, 1999) ("UNE Remand Order").

access service". Supplemental Order at ¶ 4. In the instant Notice, as modified by the Supplemental Order, the Commission has now sought comment on whether it should and can retain this restriction on a going-forward basis.

A. The Restriction Should Include Any Use Of Loops And Transport On A Stand-Alone Or Combined Basis For The Provision Of Predominantly Access-Related Services.

Although the Commission expanded the scope of the restriction to encompass the use of loop/transport combinations as described in the Supplemental Order, the restriction must be extended further to avoid exposing a large portion of the access market to pure arbitrage opportunities. For example, many special access arrangements connecting long distance carrier points of presence or "POPs" to end users use non-ILEC facilities between the POP and the end office and rely on a channel termination (the circuit from the end office to the customer's premises) purchased from the ILEC to connect to the customer. This is so where an IXC has either itself collocated at the ILEC end office or the IXC purchases dedicated access from a CLEC that has collocated at the ILEC end office. The Supplemental Order restriction applies only to loop/transport combinations and therefore does not prevent the conversion of the channel termination circuit (purchased out of an interstate access tariff as part of an expanded interconnection arrangement) into an unbundled loop under these circumstances. This form of arbitrage is indistinguishable from those addressed in the Notice and Supplemental Order, and should therefore be covered by any use restriction adopted in this proceeding.

The Supplemental Order also does not prevent the purchase of unbundled transport for the dedicated or shared transport portion of switched access services, although the Commission raised these issues in the Notice. See Notice at ¶ 496. As explained below, current law should prevent the use of shared transport for the provision of interexchange service where the requesting carrier does not provide the local service carried over the line in question. In any event, as also explained below, the potential for arbitrage for dedicated or shared transport is just as serious a problem as the problems addressed by the use restriction established in the UNE Remand Order and the Supplemental Order.

Finally, it is important to clarify the services that would remain unaffected by this use restriction. UNEs should always be available (subject of course to Section 251(d)(2)) for the provision of local exchange service (for example as the EEL would be used), local exchange and associated access service over the same line, and advanced services. The Commission should clarify this point if it decides to establish a use restriction in this proceeding.

B. The Commission's Rules Already Prohibit The Use Of Unbundled Shared Transport To Originate And Terminate Toll Service Where The Requesting Carrier Does Not Also Provide The Local Service Associated With A Particular Line.

While the Commission seeks comment on the use of unbundled shared transport to provide access without also providing local service to a customer, that issue has already been effectively resolved by the Commission's prior orders in this proceeding.

Under the Commission's existing UNE rules, a carrier that purchases unbundled end office switching associated with a particular line must provide local service over that line to the extent the customer wishes to use the line for that purpose.[4] In adopting this requirement, the Commission reasoned that a requesting carrier purchasing an unbundled local switching element "obtains all switching features in a single element on a per-line basis." See id. at ¶ 11 (emphasis in original). In the Local Competition Third Order on Reconsideration,[5] the Commission found that, when a requesting carrier purchases unbundled switching, it purchases access to the routing table resident in the switch. See Local Competition Third Order on Reconsideration at ¶ 23. It follows therefore that a requesting carrier purchasing unbundled switching purchases the routing table functionalities associated with a particular line. As with other aspects of unbundled switching, a requesting carrier can only obtain access to the routing table for a particular line to the extent that the requesting carrier also provides any local exchange service associated with the line in question.

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4 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Order on Reconsideration*, 11 FCC Rcd 13042, ¶ 13 ("Local Competition First Order on Reconsideration").

5 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Third Order on Reconsideration*, 12 FCC Rcd 12460 ("Local Competition Third Order on Reconsideration").

The Commission has held that a requesting carrier that purchases shared transport must "utilize the routing table contained in the incumbent LEC's switch." See id. at ¶ 36. As the Commission further found, "[r]outing is a critical and inseverable function of the local switch." See id. at ¶ 45. Again, under the definition of unbundled switching, in order to obtain the routing table functionality, a requesting carrier must obtain exclusive control over all of the switching functionality associated with a particular line. The logic of the Commission's unbundled switching rules therefore requires that a requesting carrier provide any local service a customer may wish to receive over a particular line in order to lease the switching functionality for that line as part of a shared transport UNE. As the Commission put it, "[r]equesting carriers that purchase shared transport as a network element to provide local service must also take local switching." See id. at ¶ 47. As a consequence, the Commission clarified "that requesting carriers that take shared or dedicated transport as an unbundled element may use such transport to provide interstate exchange access to customers to whom it [sic] provides local exchange service." Id. at ¶ 38 (emphasis added).

The Commission could not have been clearer that shared transport may not be used to provide access service where the requesting carrier does not also provide local service associated with a particular line. The only remaining issue is whether a requesting carrier should be allowed to lease shared transport for the purpose of providing long distance over a line dedicated

entirely to long distance service. To the extent such an arrangement is even cost-effective, it is in essence a form of special access arbitrage, and is therefore addressed in the following sections of these comments.

C. The Commission Has The Authority To Establish Restrictions On The Use Of UNEs.

As to dedicated and special access services, the Commission seeks comment on whether it has the authority to establish "use restrictions" on unbundled elements of the kind adopted on an interim basis in the UNE Remand Order and the Supplemental Order. There is indeed ample authority for establishing such restrictions under Sections 251(g), 251(c)(3) and 251(d)(2).[6]

First, Section 251(g) provides the Commission with independent and sufficient authority to establish a restriction on the use of loops and transport to provide certain access services. That provision states that LECs are entitled to "receipt of compensation" for access services that applied "on the date immediately preceding the date of enactment of the Telecommunications Act of 1996" until the relevant regulations are "explicitly superseded" by the Commission. See 47 U.S.C. § 251(g). On its face, therefore, Section 251(g) allows the

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[6] To the extent that these provisions allow for the imposition of use restrictions, the Commission may of course establish rules implementing such restrictions pursuant to Section 201(b) of the Act. See AT&T Corp. v. Iowa Utils. Bd., __ U.S. __, 119 S. Ct. 721, 729-732 (1999).

Commission to continue to apply the pre-1996 Act access charge pricing rules until they are "explicitly superseded."[7]

Moreover, the Commission has relied upon Section 251(g) as the basis for preserving the application of pre-1996 access charge pricing rules in situations that could just as easily have been governed by the pricing rules applicable under the 1996 Act. In so doing, the Commission effectively created long-term exceptions to the application of the 1996 Act pricing rules where interstate access charges traditionally applied.

For example, the Commission ruled in this docket that TELRIC-based reciprocal compensation rates applied only to the exchange of local traffic under Section 251(b)(5) and that "[p]ursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act."[8] Yet there is nothing in the language of Section 251(b)(5), which applies by its terms to "the transport and termination of telecommunications," that dictated this result. See 47 U.S.C. § 251(b)(5). Interexchange traffic is a form of telecommunications and could therefore easily be

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7 All of the services covered by the use restriction as discussed above in Section II.A as well as those addressed in the UNE Remand Order and the Supplemental Order provide for the origination and termination of telephone toll traffic. They therefore qualify as exchange access services under the Act, see 47 U.S.C. § 153(16), and are governed by Section 251(g).

8 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1034 ("Local Competition First R&O").

encompassed within the scope of the TELRIC-based Section 251(b)(5) prices.[9] To avoid this result (i.e., the flash-cut to TELRIC-based access charges) the Commission relied upon the historic application of non-cost based rates to the exchange of access traffic as distinct from the exchange of local traffic.

Similarly, the Commission also relied on Section 251(g) to prevent the application of TELRIC-based reciprocal compensation rates under Section 251(b)(5) to the exchange of CMRS traffic.[10] In this case as well, Section 251(b)(5) on its face appears to apply to CMRS traffic, a form of telecommunications. But the Commission prohibited this result in order to preserve the application of the pre-1996 Act interstate access charge regime to the origination and termination of interexchange CMRS traffic.

Moreover, the Eighth Circuit has specifically held that Section 251(g) gives the Commission the authority to prevent the application of the 1996 Act provisions to access services. See Competitive Tel. Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) ("CompTel v. FCC"). As the court explained, under Section 251(g)

> [T]he LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive

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9 Indeed, the Commission acknowledged "that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions." See Local Competition First R&O at ¶ 1033.

10 See id. at ¶ 1043 ("Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges").

> payment, under the pre-Act regulations and rates. This section leaves the door open for the promulgation of new rates at some future date, but any possible new exchange access rates for interstate calls will not carry the same deadline or the same cost-based restrictions as will those for interconnection and unbundled network elements specifically mentioned in Section 252(d)(1).

Id. at 1073.

To be sure, these precedents do not address the specific context of a prohibition on the use of UNEs for the provision of access service. Rather, they demonstrate that, as a general matter, Section 251(g) can be used as the basis for preventing the application of the cost-based pricing provisions of the 1996 Act to interstate access services. But nothing in Section 251(g) or anywhere else in the statute would prevent its application to the UNE context.

The Commission's apparent concern that its previous decisions construing the terms of Section 251(c)(3) somehow prevent long-term restrictions established pursuant to Section 251(g) on the use of UNEs is unfounded. In the Local Competition First R&O, the Commission relied on Section 251(g) as the basis for the temporary application of access charges on purchasers of UNEs. See Local Competition First R&O at ¶ 726. The Commission emphasized that this measure applied "only for a very limited period, to avoid possible harms that might arise if we ignore the effects on access charges and universal service of implementation of Section 251." See id. at ¶ 724. The Commission further indicated, however, that it considered the plain meaning of Section 251(c)(3), which permits "any" requesting carrier to use

UNEs to provide "a telecommunications service," to mandate that carriers be permitted to use UNEs to provide access and interexchange services. See id. at ¶¶ 356, 717. The Commission now seems concerned that this "plain meaning" interpretation would preclude any long-term restriction on the use of UNEs to provide special access.

In fact, the Commission has already effectively restricted the use of UNEs to provide interstate access services in certain contexts, albeit without explicitly relying on Section 251(g) as authority. For example, in the Local Competition First R&O and Local Competition First Order on Reconsideration, the Commission ruled that requesting carriers may not use unbundled loops or, as mentioned, switching solely for the purpose of providing access where the customer in question also wants to purchase local traffic using those facilities. See Local Competition First R&O at ¶ 385; Local Competition First Order on Reconsideration at ¶ 13. There is nothing inherent in the characteristics of loops or switching that mandated this result, since long distance carriers have long purchased access to loops and switches to provide long distance service without also providing local service over those facilities.[11] Section 251(c)(3) could have

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[11] The Commission essentially conceded that defining unbundled loops in functional terms as a shared facility was one reasonable approach it could have adopted:

> Some parties advocate defining a loop element as merely a functional piece of shared facilities, similar to capacity purchased on a shared transport trunk. According to these parties, this definition would enable an IXC to purchase a loop element solely for purposes of providing interexchange service. While such a definition, based on the types of

been construed to require that "any" requesting carrier seeking to provide "a telecommunications service" includes a carrier seeking to provide access over loops and switches over which the IXC does not provide local service. By refusing to allow carriers seeking to provide access service to share these facilities with local carriers in this fashion, the Commission made a policy decision to restrict the use of the UNEs in question for the purposes of access arbitrage.

Nor is it significant that the restriction on the use of loops and switching was derivative of the Commission's definition of those elements. Those definitions are regulatory constructs designed in part to prevent the collapse of the interstate access regime. The Commission could therefore just as easily rely on its authority under Section 251(g), as it has in several other contexts, to modify the definition of loops and transport so that those UNEs may not be used to provide access services in the circumstances at issue here.

Second, Section 251(c)(3) also provides an independent and sufficient basis for restricting the use of UNEs to provide access. Section 251(c)(3) allows ILECs to place just and reasonable "conditions" on a requesting carrier's access to UNEs. See 47 U.S.C. § 251(c)(3). Although the Commission has not

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> traffic provided over a facility, may allow for the separation of costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate.
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> Local Competition First R&O at ¶ 385.

relied on this term in the past, there is nothing in the language of Section 251(c)(3), the Commission's decisions, or the relevant case law that would prevent the Commission from concluding that the restriction on the use of loops and transport for the provision of access is a just and reasonable condition.

Third, the "impairment" standard in Section 251(d)(2)(B) also provides an independent and sufficient basis for restricting the use of loops and transport in the manner at issue. Section 251(d)(2) requires that the Commission "at a minimum" consider certain factors when it determines what elements should be unbundled. See 47 U.S.C. § 251(d)(2). As the Commission has recognized, this standard allows the Commission to consider any factors that comport with the general goals of the 1996 Act. See UNE Remand Order at ¶ 101. Certainly one such Congressional policy, embodied in Section 251(g), is the preservation of the pre-1996 Act access charge regime.

But even the "impairment" standard itself offers the Commission the specific authority, indeed the obligation, to determine whether a requesting carrier should be permitted to provide a specific service using UNEs. Section 251(d)(2)(B) requires that the Commission determine whether failure to provide access to a UNE "would impair the ability of the telecommunications carrier seeking access to provide the service it seeks to offer." 47 U.S.C. § 251(d)(2)(B) (emphasis added). The statute therefore affirmatively requires the Commission to consider whether a requesting carrier will be impaired in providing the access service it seeks to provide if loops and

transport are unavailable as UNEs for this purpose. If the Commission were to conclude that requesting carriers seeking to provide the relevant access services would not be impaired if loops and transport individually or in combination were unavailable as UNEs for this purpose at TELRIC-based prices, then Section 251(d)(2) would grant the Commission the authority to establish a long-term restriction on the use of loops and transport.

In fact, the Commission relied on Section 251(d)(2) to establish several use restrictions in the UNE Remand Order (though not on the provision of access). For example, the Commission ruled that requesting carriers may not use unbundled switches to provide service to customers with four or more lines located in zone one of the top 50 MSAs if the ILEC offers the EEL. See UNE Remand Order at ¶ 278. The Commission characterized this as a restriction on the customers that can be served rather than the services that can be provided using unbundled switching, but this is a distinction without a difference. Many of the use restrictions at issue here could just as easily be characterized as restrictions on the customers served -- for example, those customers seeking special access service. In most cases in which the Commission requires unbundling of an element in only limited circumstances, it effectively establishes a use restriction. Thus, the restrictions it placed on the availability of DSLAMs and dark fiber constitute use restrictions. See id. at ¶¶ 313 (DSLAMs), 352 (dark fiber). It is clear therefore that the Commission is

required to establish use restrictions under Section 251(d)(2) in order to give meaning to that provision.

D. The Commission Should Exercise Its Authority Under Sections 251(g), 251(c)(3) and 251(d)(2) To Establish Appropriate Restrictions On The Use Of Loops And Transport To Provide Predominantly Access-Related Services.

Given that the terms of the three statutory provisions at issue are different, the analysis of whether the Commission should apply them to restrict the use of UNEs to provide predominantly access-related services varies somewhat among the three sections. The Commission may adopt such a requirement pursuant to Section 251(g) so long as the restriction preserves access charges that were in place at the time of the passage of the 1996 Act, and so long as its decision comports with the generic Administrative Procedure Act ("APA") requirement that the decision is not arbitrary, capricious or contrary to law. See 5 U.S.C. § 706(2)(A). The question under Section 251(c)(3) is whether the restriction is a "just and reasonable" condition on the use of UNEs.[12] Given that there is little question that the services in question are access services, these first two standards are roughly equivalent; they both require only that the Commission's decision be reasonable. Finally, the question under Section 251(d)(2) is whether the restriction meets the Section

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[12] Of course, the APA review standard also applies here as well, but is essentially duplicative of the statutory standard. It would also apply to a court's review of the application of the standard the Commission has established for Section 251(d)(2), assuming that the Commission's standard itself comports with terms of Section 251(d)(2).

251(d)(2) standard adopted by the Commission in the UNE Remand Order.

First, there are compelling public policy reasons as to why it would be reasonable, and therefore permissible under Sections 251(g) and 251(c)(3), to prohibit the use of UNEs for the provision of dedicated and special access services. From TWTC's perspective, the most important reason is that a flash-cut to TELRIC-based prices for these services would substantially reduce TWTC's incentive to expand its entry in the 21 markets it has already entered or to invest in network facilities in new geographic areas. In addition, regulatory prescription is inherently flawed and will likely create market distortions. For example, if TELRIC rates are set too low, even efficient entrants like TWTC would not be able to compete. The risks inherent in prescriptive rate reduction would thus increase the level of uncertainty in the market, and would likely increase the cost of capital for TWTC and other new entrants.

Allowing access arbitrage would also cause state commissions to dictate interstate access rates. Since the states have primary responsibility for setting UNE prices, the access prices for interstate special and dedicated access would become effectively within the purview of the state commissions. The FCC should be wary of abdicating its authority over interstate access in this manner.

Furthermore, access arbitrage would largely replace the Commission's market-based approach to access charge reform, just recently implemented in the Fifth Report and Order in the Access

Charge proceeding, with a prescriptive approach. The Commission initially decided to adopt a market-based approach to lowering access charges because, among other things, (1) "[c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production;" and (2) "using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets."[13]

These policies are fully relevant today in the area of dedicated and special access services. As mentioned, there should be no question that reliance on markets for the reduction of access charges is superior to what would amount to a flash-cut to artificial TELRIC-based prices.[14] Given the imperfect nature of regulation, TELRIC-based prices (while a necessity in certain cases) are likely to create new distortions and maintain others. Just as importantly, establishing the preconditions for facilities-based entry will encourage carriers with lower cost curves to enter the market, thus introducing dynamic

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13 See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, *First Report and Order*, 12 FCC Rcd 15982, ¶ 46 (1997) ("Access Charge First R&O").

14 It should be noted that, for most ILECs, the actual price index for the trunking basket (which includes special access and transport services) is below the price cap index, an indication that the ILECs' pricing is constrained at least somewhat by competition.

efficiencies. Prescriptive regulation, at best, merely forces prices down the ILECs' existing cost curves, and therefore is likely to result in less beneficial static efficiencies.[15]

Just last year the Commission established a specific framework for the introduction of ILEC pricing flexibility in areas where certain competitive triggers have been met. These triggers are designed to give ILECs the ability to lower rates once "competitors have made irreversible investments in the facilities needed to provide the services at issue."[16] For example, to qualify for Phase I pricing flexibility for dedicated transport or special access (other than channel terminations), an ILEC must demonstrate that competitors have collocated in 15 percent of the ILEC's wire centers in an MSA, or in wire centers accounting for 30 percent of the ILEC's revenues for these services. Id. at ¶ 93. In each case, the collocator must obtain transport from a non-ILEC source (self-supply or a third-party). See id. at ¶ 77 n.106. Other triggers are similarly designed to

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15 It should also be noted that, while the Commission has recently inquired as to the extent that "third party pays" issues have limited the effectiveness of the market for switched access service, there exists no such potential problem for special or dedicated access. See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, *Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, ¶ 239-257 (1999).

16 See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, *Fifth Report and Order*, 14 FCC Rcd 14221, ¶ 69 (1999) ("Access Charge Fifth R&O").

allow pricing flexibility in response to facilities-based competition.

To be sure, the Commission's framework for pricing flexibility has assumed that carriers entering the market would be able to rely on UNEs at TELRIC-based rates in certain cases. See Access Charge First R&O at ¶ 262; Access Charge Fifth R&O at ¶ 113. But, as mentioned, the Commission made sure to avoid a flash-cut reduction in access charges, at least on the switched side, by preventing the use of loops and switches for the provision of long distance alone where the customer also wants to use the facilities for local service. The same logic dictates that the opportunities for pure access arbitrage on special access and dedicated transport must be eliminated. Otherwise, the framework for facilities-based entry would collapse.[17] Surely it would be reasonable and therefore permissible under Sections 251(g) and 251(c)(3) for the Commission to rely on these considerations to establish use restrictions on UNEs for the provision of special and dedicated transport.

Second, these policy concerns compel the same result under Section 251(d)(2). In applying Section 251(d)(2), the Commission considers a number of factors, such as the cost, timeliness, quality, ubiquity, and operational compatibility of non-UNE alternatives of supply. See UNE Remand Order at ¶ 65. In

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[17] See Letter from J. Richard Teel, BellSouth, to Lawrence E. Strickling, CC Docket No. 96-98 at 2 (Sept. 7, 1999) (explaining that significant reductions in special access rates will cause lower access charges).

addition, the Commission considers "other factors that are consistent with the objectives of the Act in making [its] unbundling determinations." See id. at ¶ 101. The objectives of the Act listed by the Commission were the rapid introduction of competition generally and facilities-based competition specifically, the reduction of regulatory obligations, certainty in the market, and administrative feasibility. See id. at ¶¶ 103-105. In its analysis, the Commission does "not give particular weight to any of the factors," but rather considers "the relationship among the factors." See id. at ¶ 106. As the Commission explained,

> [T]here may be circumstances in which there is significant evidence that competitors are impaired without unbundled access to a particular element, but that unbundling the element would not further the goals of the Act. In the final analysis, as we explain in more detail below, we consider the effect of these factors in order to develop unbundling obligations that are most consistent with Congressional intent.

Id.

When this open-ended standard is applied to special and dedicated access service, it is clear that a use restriction is appropriate. Most importantly, as described, the Commission has tried to prevent the pricing standards of the 1996 Act from offering pure arbitrage opportunities to requesting carriers. As the Commission has emphasized, the availability of UNEs is intended to spur the development of facilities-based competition. See id. at ¶ 110. Moreover, while the Commission has stated that availability of UNEs in many cases will assist carriers until they can build their own facilities, pure arbitrage does nothing

of the sort. In essence, the Commission has found that the goals of the 1996 Act include establishing the preconditions for facilities-based competition and avoiding a flash-cut reduction in access charges. The restrictions placed on the use of UNEs, the Commission's market-based approach to access charge reform as well as the prohibition on resale of access services (even though some, like special access, are purchased at retail by customers other than carriers),[18] all reflect this fundamental policy. It is hard to see how an exception should be carved out for special and dedicated access where that is the access service subject to the greatest facilities-based competition.

The IXCs will no doubt argue that non-UNE alternatives for special and dedicated access are not ubiquitous enough and are too expensive *vís-a-vís* UNEs to meet the impairment standard.[19] But these concerns are outweighed by the serious policy concerns described above. Indeed, the Commission must conclude that it would not "further the goals of the Act" to focus solely on the impairment analysis while ignoring salient policy issues that have caused the Commission to prevent flash-cuts to cost-based

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[18] See Local Competition First R&O at ¶ 873.

[19] In this regard it should be noted that the special access and dedicated transport rates that are currently tariffed have been found (either presumptively, under price caps, or after regulatory review) to be just and reasonable. Although the Commission has been unwilling as part of the "impairment" analysis to consider the availability of tariffed services as viable alternatives to UNEs, see UNE Remand Order at ¶¶ 68-70, the point remains that access rates that are just and reasonable must by some measure be rates that do not "impair" a long distance carrier's ability to provide interexchange service.

access charges in every other context since the passage of the 1996 Act.

III. THE COMMISSION SHOULD ADOPT AN EASILY ADMINISTERED STANDARD FOR DETERMINING WHETHER UNES ARE USED FOR THE PROVISION OF PREDOMINANTLY ACCESS-RELATED SERVICES.

In applying the restriction on the use of UNEs for the provision of special access service and dedicated transport used for the provision of access service, the Commission should adopt a standard that actually implements the restriction and that is not unduly burdensome either for carriers or the Commission to apply. In this regard, it may be most appropriate to establish proxies that amount to presumptions that the requesting carrier is using the UNEs in question for non-access arbitrage purposes. Whatever proxy is chosen, it should ensure that loop and transport facilities available as UNEs are used at least substantially for the provision of local or advanced service.

IV. CONCLUSION

The Commission should therefore prohibit requesting carriers from using unbundled loops and transport to provide access service in the manner described herein.

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